

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 157 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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NANCHANDBHAI DAHYABHAI THAKAR

Versus

VIKRAMBHAI NATVARLAL PATEL

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Appearance:

MR YS MANKAD for Petitioners

SERVED for Respondent No. 1

PUBLIC PROSECUTOR for Respondent No. 2

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CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 17/03/97

ORAL JUDGEMENT

1. This application is filed by the original accused in Criminal Case No.1316/90 on the file of the Ld.Metropolitan Magistrate, Court No.7, Ahmedabad to quash and set aside the order of issuance of process by way of bailable warrant for offences punishable under sections 406 & 420 of I.P.Code against them.

2. The petitioner--Shri Nanchandbhai Dahyabhai Thakkar has died during the pendency of this application. The respondent No1--Vikrambhai Natvarlal Patel has filed this private complaint bearing Criminal Case No.1316/90 against the present applicants. It is alleged by the respondent No.1 that the accused-applicants before this court approached S.J.Patel Family Trust and P.S.Patel Family Trust in order to secure personal loan for their business of tooth paste. According to the respondent No.1 he is working as a Manager of S.J.Patel Family Trust as well as P.S.Patel Family Trust. The accused applicants promised at that time that they would return the amount of loan whenever demanded. They had borrowed Rs.50,000/- by Cheque No.557655, dated 20.54.89 and Rs.81,500/- by cheque No.510656, dated 25.4.89 from S.J.Patel Family Trust and they have further taken loan of Rs.50,000/- by cheque No.570641 dated 24.4.89 and taken loan of Rs.5000/- by cheque No.570642. Though the complainant had asked them to return the said money, the applicant-accused did not return the same. Initially they promised to return the same within 12 months, but they did not do so. Then they had further promised to return within four months, but within four months they had not returned the same. Thus, it is alleged that they have committed criminal breach of trust and they have also cheated and thus they have committed offence punishable under sections 406 & 420 of I.P.Code. After recording the statement on oath of the complainant, the Ld.Metropolitan Magistrate was pleased to issue process against the present applicants by passing the following order:

"Bailable warrant to issue against accused under sections 406, 420 and 114 of I.P.Code"

3. Being aggrieved by the said order of the Ld.Metropolitan Magistrate petitioners have come before this court. It is contended on behalf of the petitioners that on the face of the complaint, it does not disclose any commission of criminal offence by the present accused-applicants. It is further contended that the dispute between the parties is purely of civil nature as the complainant has already taken recourse for the civil proceedings by filing civil suit against the present applicants. Thus, the prosecution in question is clear misuse of process of law and therefore the court should exercise the powers under section 482 of Cr.P.C. and quash said prosecution.

4. It is settled law that when considering the question of quashing the prosecution the court has to accept the averments made by the complainant in the application by giving face value to the averments made in the complaint. At a stage of exercising powers under section 482 Cr.P.C. the court can not go into the question of appreciating the evidence or can not weigh and consider the evidence and the court has to only consider on the basis of complaint and the material put up along with the complaint as to whether there is any disclosure of any criminal offence by the accused. In the case of MADHAVRAO JIVAJI RAO SCINDIA VS SAMBHAJIRAO CHANDROJIRAO ANGRE reported in AIR 1988 SC 709 the Apex Court has considered the exercise of powers under section 482 Cr.P.C. and has laid down the following principles:

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court can not be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak, and therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also while taking into consideration the special facts of a case quash the proceedings even though it may be at a preliminary stage.

5. In the case of PUNJAB NATIONAL BANK vs SURENDRA PRASAD SINHA reported in AIR 1992 SC 1815 it has been held by the Apex Court that "the judicial process should not be an instrument of oppression or needless harassment. The court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of private complainant as vendetta to harass the person needlessly."

6. Therefore, bearing in mind the above principles laid down by the Apex Court I proceed to consider as to

whether the prosecution in question is to be allowed to continue?

7. The applicants before me have produced the copies of suits filed against the present revision application under Order 37 of C.P.Code bearing Summary Suit Nos.2512/90 & 2513/90 filed on 31st May, 1990. Statement of account annexed to said plaint also shows that there some monetary transactions between the parties and as per the averments made in the suit the present applicants before me owed an amount of Rs.1,30,000/- on their account with the complainant in Summary Suit No.2512/90. In Summary Suit No.2513/90 it is the claim of the respondent before me that the petitioners owe Rs.36,000/on their account. The said suit is also having an annexure of the statement of account which shows that certain amounts are paid by the present applicants before me and balance amount due from them is of the amount claimed in the suit. In view of these two Summary Suits filed against the applicants it would be quite clear that the transactions between the parties are pure civil nature. It is very pertinent to note that in the complaint it is the claim of the complainant that the accused-applicants before me had approached for getting loan from the trust and the amount in question was obtained by way of loan. When amount is paid by way of loan the failure to repay the loan would never amount to commissioning of any criminal offence. In case of loan there would be no question of any entrustment of amount by the complainant to the accused.

8. The complainant has alleged that the accused has committed offence under sections 406 & 420 and the learned Magistrate has blindly issued process under both the sections. The offence under sections 406 and 420 can not run together at a time. In case of an offence under section 406 there is a volutnary entrustment of property or valuable security by the complainant to the accused whereas in offence under section 420 the delivery of property or valuable security takes place on account of deceit or fraud played by the accused on the complainant. From the averments made by the complainant it is quite clear that the complainant has not even made any averment of fraud or deceit played by the accused on account of which the complainant was induced to handover the amount in question to the accused. There are no averments in the complaint to disclose the offence of either criminal breach trust or of cheating. It seems that the present prosecution is lodged with a view to pressurise the accused to pay to the complainant trust the amount which the complainant-trust is claiming from the accused. The

prosecution in question is a clear case of misuse of process of law. Therefore, in the circumstances, continuation of such prosecution could not be allowed and the present application will have to be allowed and the prosecution lodged against the present applicants will have to be quashed and set aside by exercising powers under section 482 of Cr.P.Code.

9. I, thus, allow the present application and hereby quash and set aside the prosecution in Criminal Case No.1316/90 on the file of the Ld.Metroplitan Magistrate, Court No.7, Ahmedabad. Rule is made absolute accordingly.

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